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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-291

AMERICAN MODULARS CORP.,

Respondent,

v.

EDGAR L. LINDLEY,

TAX COMMISSIONER OF OHIO,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

WILLIAM J. BROWN
Attorney General

JOHN C. DUFFY, JR.
Assistant Attorney General

State Office Tower
30 East Broad Street
Columbus, Ohio 43215
(614) 466-3142

COUNSEL FOR PETITIONER,
TAX COMMISSIONER OF OHIO

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THE SUPREME COURT OF OHIO

The Petitioner, EDGAR L. LINDLEY, TAX COMMISSIONER OF OHIO, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Ohio entered in this proceeding on May 24, 1978.

OPINIONS BELOW

A. The opinion of the Supreme Court of Ohio, reported at 54 Ohio St. 2d 273, appears in the appendix hereto.

B. The unreported entry of the Board of Tax Appeals, State of Ohio, issued May 12, 1977, also appears in the appendix hereto.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on May 24, 1978. This Petition for Certiorari was filed within ninety (90) days of that judgment. This court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

The question presented here is whether the county permissive use tax enacted by the Ohio General Assembly violates the Commerce Clause of the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. art. I, §8, cl. 3:

> The Congress shall have power...
>
> To regulate commerce with foreign nations and among the several States, and with the Indian tribes;

OHIO STATUTES INVOLVED

Ohio Rev. Code §5741.01 (B) and (C):

As used in sections 5741.01 to 5741.22, inclusive, of the Revised Code;

(B) "Storage" means and includes any keeping or retention in this state for use or other consumption in this state.

(C) "Use" means and includes the exercise of any right or power incidental to the ownership of the thing used.

Ohio Rev. Code §5741.02:

(A) For the use of the general revenue fund of the state, an excise tax is hereby levied on the storage, use, or other consumption in this state of tangible personal property, as follows:

(1) No tax, if the price for which such property has been purchased is less than sixteen cents;

(2) One cent, if the price is more than fifteen but not more than thirty-one cents;

(3) Two cents, if such price is more than thirty-one cents and not more than fifty-one cents;

(4) Three cents, if such price is more than fifty-one cents and not more than seventy-one cents;

(5) Four cents, if such price is more than seventy-one cents and not more than one dollar;

(6) If such price is in excess of one dollar, four cents on each full dollar thereof; and if such price is not an even number of dollars, then, in addition to said tax on each full dollar, one cent, if such price exceeds an even number of dollars by more than eight but not more than thirty-one cents; two cents, if such excess is more than thirty-one cents and not more than fifty-one cents; three cents, if such excess is more than fifty-one cents and not more than seventy-one cents; and four cents if such excess is over seventy-one cents.

(B) Each consumer, storing, using, or otherwise consuming in this state tangible personal property shall be liable for the tax, and such liability shall not be extinguished until the tax has been paid to this state; provided that the consumer shall be relieved from further liability for the tax if the tax has been paid to a seller in accordance with section 5741.04 of the Revised Code or prepaid by the seller in accordance with section 5741.06 of the Revised Code.

(C) The tax does not apply to the storage, use, or consumption in this state of the following described tangible personal property, nor to the storage, use, or consumption in this state of tangible personal property purchased under the following described circumstances:

(1) When the sale of property in this state is subject to the excise tax imposed by sections 5739.01 to 5739.31 of the Revised Code, provided said tax has been paid;

(2) Tangible personal property, the acquisition of which, if made in Ohio, would be a sale not subject to the tax imposed by sections 5739.01 to 5739.31 of the Revised Code;

(3) Property, the storage, use, or other consumption of which this state is prohibited from taxing by the constitution of the United States, laws of the United States, or the constitution of this state. This exemption shall not exempt from the application of the tax imposed by this section the storage, use, or consumption of tangible personal property which was purchased in interstate commerce, but which has come to rest in this state, provided that fuel to be used or transported in carrying on interstate commerce which is stopped within this state pending transfer from one conveyance to another is exempt from the excise tax imposed by this section and section 5739.02 of the Revised Code;

(4) Transient use of tangible personal property in this state by a nonresident tourist or vacationer, or a non-business use within this state by a nonresident of this state, if the property so used was purchased outside this state for use outside this state and is not required to be registered or licensed under the laws of this state;

(5) Tangible personal property up on which taxes have been paid to another jurisdiction to the extent of the amount of the tax paid to such other jurisdiction. Where the amount of the tax imposed by this section and imposed pursuant to section 5741.021 [5741.02.1] or 5741.022 [5741.02.2] of the Revised Code exceeds the amount paid to another jurisdiction, the difference shall be allocated between the tax imposed by this section and any tax imposed by a county or a transit authority pursuant to section 5741.021 [5741.02.1] or 5741.022 [5741.02.2] of the Revised Code, in proportion to the respective rates of such taxes.

As used in this subdivision, "taxes paid to another jurisdiction" means the total amount of retail sales or use tax or similar tax based upon the sale, purchase, or use of tangible personal property legally levied by and paid to another state or political subdivision thereof, or to the District of Columbia, where the payment of such tax does not entitle the taxpayer to any refund or credit for such payment.

For the purpose of the proper administration of sections 5741.01 to 5741.22, inclusive, of the Revised Code, and to prevent the evasion of the tax hereby levied, it shall be presumed that any use, storage, or other consumption of tangible personal property in this state is subject to the tax until the contrary is established.

Ohio Rev. Code §5741.021:

For the purpose of providing additional general revenues for the county and paying the expenses of administering such levy, any county which levies a tax pursuant to section 5739.021 [5739.02.1] of the Revised Code shall levy a tax at the same rate levied pursuant to section 5739.021 [5739.02.1] of the Revised Code on the storage, use, or other consumption in the county of motor vehicles acquired on or after the effective date of this act by a transaction subject to the tax imposed by section 5739.02 of the Revised Code and, in addition to that imposed by section 5741.02 of the Revised Code, on the storage, use, or other consumption in the county of tangible personal property which is subject to the tax levied by this state as provided in section 5741.02 of the Revised Code. The tax shall be levied pursuant to a resolution of the board of county commissioners which shall be adopted after publication of notice and hearing in the same manner as provided in section 5739.021 [5739.02.1] of the Revised Code. Such resolution shall be adopted and shall become effective on the same day as the resolution adopted by the board of county commissioners levying a sales tax pursuant to section 5739.021 [5739.02.1] of the Revised Code and shall remain in effect until such sales tax is repealed.

(A) The tax on the storage, use, or other consumption of tangible personal property levied pursuant to this section shall be in addition to the tax levied by section 5741.02 of the Revised Code.

(B) If the additional tax is levied by the county at the rate of one-half of one per cent, the combined state and county tax shall be as follows:

If the price is at least	But not more than	The amount of the tax is
$ .01	$ .15	No tax
.16	.22	1¢
.23	.44	2¢
.45	.66	3¢
.67	.88	4¢
.89	1.11	5¢
1.12	1.33	6¢
1.34	1.55	7¢
1.56	1.77	8¢
1.78	2.00	9¢

If the price is at least	But not more than	The amount of the tax
2.01	2.22	10¢
2.23	2.44	11¢
2.45	2.66	12¢
2.67	2.88	13¢
2.89	3.11	14¢
3.12	3.33	15¢
3.34	3.55	16¢
3.56	3.77	17¢
3.78	4.00	18¢
4.01	4.22	19¢
4.23	4.44	20¢
4.45	4.66	21¢
4.67	4.88	22¢
4.89	5.11	23¢

If the price is in excess of an even dollar, four and one-half cents for each full dollar and in addition, one cent if the price exceeds an even dollar but not more than such even dollar and twenty-two cents; two cents if the price exceeds an even dollar and twenty-two cents but not more than such even dollar and forty-four cents; three cents if the price exceeds an even dollar and forty-four cents but not more than such even dollar and sixty-six cents; four cents if the price exceeds an even dollar and sixty-six cents but not more than such even dollar and eighty-eight cents; five cents if the price exceeds an even dollar and eighty-eight cents but not more than the following odd dollar and eleven cents; six cents if the price exceeds such odd dollar and eleven cents, but not more than such odd dollar and thirty-three cents; seven cents if the price exceeds such odd dollar and thirty-three cents but not more than such odd dollar and fifty-five cents; eight cents if the price exceeds such odd dollar and fifty-five cents but not more than such odd dollar and seventy-seven cents; nine cents if the price exceeds such odd dollar and seventy-seven cents but not more than the following even dollar.

(C) The tax levied pursuant to this section shall not be applicable to any storage, use, or consumption of property not within the taxing power of a county under the constitution of the United States, or the constitution of this state or to property on which a

tax levied by a county pursuant to section 5739.021 [5739.02.1] or 5741.021 [5741.02.1] of the Revised Code has been paid or would have been paid had the county in which the original storage, use, or consumption of the property was made in this state levied a tax pursuant to such sections on the property.

STATEMENT OF THE CASE

During the years 1970 to 1973, the Respondent, American Modulars Corp. (hereinafter referred to as Modulars) was engaged in the on-site construction and erection of modular homes in Ohio pursuant to real estate construction contracts on land belonging to others as well as such construction on its own land for future sale. Because of the activity engaged in, it was the consumer of all tangible personal property purchased in Ohio and, as such, had to pay all sales taxes levied pursuant to Ohio Rev. Code Chap. 5739. Likewise, it was also the consumer of all tangible personal property purchased outside of Ohio for "storage, use, or other consumption in this state" and, as such, had to pay all use taxes levied pursuant to Ohio Rev. Code Chap. 5741.

The General Assembly of Ohio has enacted the sales and use taxes referred to above and said taxes are administered by the Petitioner, Edgar L. Lindley, Tax Commissioner of Ohio (hereinafter referred to as Tax Commissioner).

The State of Ohio levies a four percent (4%) sales tax on all retail sales made in Ohio. Ohio Rev. Code §5739.02. In addition, the State of Ohio levies a four percent (4%) use tax on the "storage, use, or other consumption in this state of tangible personal property." Ohio Rev. Code §5741.02. The same exemptions and exceptions allowed under the Ohio sales tax are applicable to the Ohio use tax. Ohio Rev. Code §5741.02 (C) (2). In addition, Ohio allows a credit towards the tax levied by Ohio Rev. Code §5741.02 of any sales or use tax paid to another jurisdiction on the same property by the same taxpayer. Ohio Rev. Code §5741.02 (C) (5). Finally, to avoid double taxation for persons using or storing in Ohio tangible personal property which was purchased in this State, Ohio Rev. Code §5741.02 (C) (1) exempts from the State use tax the use or storage of property purchased in Ohio which was subject to the Ohio sales tax at the time of purchase. However, this exemption only applies when the Ohio sales tax has been paid.

In order to provide additional general revenues, the General Assembly of Ohio has delegated to the eighty-eight (88) individual Ohio counties the authority to enact a one-half percent (½%) sales tax and a one-half percent (½%) use tax commonly referred to as the "permissive" sales and use taxes. Ohio Rev. Code §§5739.021 and 5741.021. The permissive sales and use taxes are not taxes *levied* by the State of Ohio. Rather, they are *local* taxes levied by the counties which adopted the taxes pursuant to the authority delegated to them by the State of Ohio in Ohio Rev. Code §§5739.021 and 5741.021. Because the permissive use tax is a tax levied "in addition to that imposed by Section 5741.02 of the Ohio Revised Code [the State use tax]," R. C. 5741.021 provides that the permissive use tax may only be levied:

> ". . . on the storage, use, or other consumption in the county of tangible personal property which is subject to the tax levied by this state in section 5741.02 of the Revised Code. . . ."

Thus, the permissive use tax cannot be levied on property *purchased* in Ohio in a county which has not enacted the permissive use tax even though such property might later be stored or used by the consumer in a county which has enacted the permissive use tax.[1] The one exception to this is when a consumer has not paid the Ohio sales tax applicable to a purchase, the Ohio use tax may be alternatively assessed. Ohio Rev. Code §5741.02 (C) (1).

Modulars purchased tangible personal property for use in the performance of its real estate construction contracts in Hamilton County, Ohio, and Montgomery County, Ohio. Both of these counties have enacted the permissive sales and use taxes. Such property was purchased from vendors located in both permissive and nonpermissive counties in Ohio. In addition to the Ohio sales tax, Modulars has either paid or has been assessed the permissive sales tax on all such purchases made from vendors located in Ohio counties which have enacted the permissive sales tax. Modulars did not pay nor has it been assessed the permissive sales tax on such purchases from vendors located in a nonpermissive county.

Modulars also purchased tangible personal property for use in the performance of its real estate construction contracts in Hamilton County, Ohio, and Montgomery County, Ohio, from vendors located outside of Ohio. In addition to the Ohio use tax,

Modulars was assessed the permissive use tax on all such purchases. Modulars appealed the final assessment of the permissive use tax to the Ohio Board of Tax Appeals pursuant to Ohio Rev. Code §5717.02, alleging that said permissive use tax violated the Commerce Clause of the United States Constitution. The Ohio Board of Tax Appeals affirmed the Tax Commissioner's assessment of the permissive use tax because it is without jurisdiction to declare a statute or its application unconstitutional. *S. S. Kresge Co.* v. *Bowers,* 170 Ohio St. 405, 166 N. E. 2d 139 (1960).

An appeal of right was taken by Modulars to the Supreme Court of Ohio pursuant to Ohio Rev. Code §5717.04. The only issue considered by the Supreme Court of Ohio was:

> ". . . whether R. C. 5741.021, as a permissive local use tax incorporating the exceptions of a mandatory state use tax, violates the Commerce Clause of the United States Constitution."
>
> *American Modulars Corp.* v. *Lindley,* 54 Ohio St. 2d 273, 275, 376 N.E. 2d 575, 576. [Footnote reference deleted]

The syllabus written by the Supreme Court of Ohio in *American Modulars, supra,* reads as follows:

> "Insofar as the application of R. C. 5741.021 imposes a higher tax rate on property purchased out of state and used in a taxing county than on similarly used property purchased in the state, that statute discriminates against interstate commerce and violates the Commerce Clause of the United States Constitution."
>
> *Id.* at 273.

The effect of this decision is that it renders the permissive use tax unconstitutional as applied to the "storage, use, or other consumption" in Ohio of every kind of tangible personal property except motor vehicles.

1 The permisssive sales tax does not apply to the sale of any motor vehicle, Rather, the permissive use tax is levied on the " storage, use, or consumption" of a motor vehicle in a permissive county. The applicability of the tax is determined on the county where the purchaser originally registers the vehicle.

REASONS FOR GRANTING THE WRIT

The opinion of the Supreme Court of Ohio should be reviewed by this Court because it erroneously applies the decisions of this Court in *Henneford* v. *Silas Mason,* 300 U.S. 577, 57 S. Ct. 524, 81 L. Ed. 814 (1937), and *Halliburton Oil Well Cementing Co.* v. *Reily,* 373 U.S. 64, 83 S. Ct. 1201, 10 L. Ed. 2d 202 (1963), to reach a conclusion that Ohio Rev. Code §5741.021 discriminated against interstate commerce and, therefore, violates the Commerce Clause of the United States Constitution. U.S. Const., art. I, §8, cl. 3.

In both *Henneford* and *Halliburton Oil Well Cementing Co., supra,* equality of the tax burden was the deciding factor in determining the validity of a state use tax. A use tax on a purchase made out of state was to impose no greater a tax burden than did a sales tax on a like purchase made in the state. Because the Washington state use tax subjected out-of-state purchases to the same tax burden that would be placed on in-state purchases, it was held to be constitutional. *Henneford, supra.* Likewise, because fabrication labor was not subject to the sales tax when property was purchased and assembled in Louisiana for use in Louisiana while fabrication labor was subject to the Louisiana use tax when like property was purchased and assembled outside of Louisiana for use therein, the Louisiana use tax was found to be discriminatory. *Halliburton Oil Well Cementing Co., supra.*

Although this Court stated in *Halliburton Oil Well Cementing Co., supra,* that "equal treatment for in-state and out-of-state taxpayers is the condition precedent for a valid use tax on goods imported from out of state,"[2] the Court, in reality, considered whether in-state and out-of-state purchases were subjected to the same tax burden rather than whether the tax was applied equally to in-state and out-of-state taxpayers. For, indeed, all persons are in-state with their property when such property purchased out-of-state is subjected to a state use tax. It is the failure of the Supreme Court of Ohio to understand this Court's terminology and reasoning in *Henneford* and *Halliburton Oil Well Cementing Co., supra,* which led to the erroneous opinion in this case.

2 *Halliburton Oil Well Cementing Co. v. Reily, supra,* 373 U.S. at 70, 83 S. Ct. at 1204, 10 L. Ed. 2nd at 207.

The permissive use tax enacted in Ohio Rev. Code §5741.021 comports with the criteria which must be satisfied to sustain the validity of a use tax. Modulars was assessed the permissive use tax on its out-of-state purchases because the *original* "use" or "storage" by Modulars of this property in Ohio was in Ohio counties which had enacted the permissive use tax. If the *original* "use" or "storage" of this property by Modulars had been in a county which did not levy a permissive use tax, such a tax could not be levied if the property was later used or stored in a permissive county.[3] Modulars' in-state purchases were similarly taxed. It paid the permissive sales tax if the purchase was made in a permissive county and it did not pay the permissive sales tax on purchases made in a nonpermissive county even though such goods were later used in a permissive county. In the instant case, Modulars did not establish nor did it attempt to establish that the property purchased outside of Ohio was originally used or stored in a nonpermissive county in Ohio. For this reason, all of its out-of-state purchases were assessed permissive use tax when it came to rest in Hamilton County, Ohio, or Montgomery County, Ohio—both of which are permissive counties.

This is the first time that the Court has been asked to consider the validity of a county use tax. The State of Ohio has delegated its authority to enact sales and use taxes to the counties in Ohio if they so desire for the purpose of providing additional revenue for the counties. It is not a mandatory tax. Rather, it is permissive. Forty-two (42) counties in Ohio presently levy such taxes. Ohio has achieved all the equality that can be had in such a tax. It is administratively impossible to have only a permissive use tax which would be applicable to all in-state purchases, wherever made, as well as to out-of-state purchases. Moreover, the permissive sales tax might not withstand an equal protection challenge if left as the only viable tax. Finally, Ohio has an additional one-half percent (½%), one percent (1%) or one and one-half percent (1½%) permissive sales and use tax which may be enacted by the individual counties to finance a regional transit authority.[4] While the validity of the regional transit authority tax is not involved in the instant case, said tax operates in an identical manner to the tax in issue here. The most populous county in Ohio finances its regional transit authority to a greater extent from this permissive sales and use tax. Therefore, a review of the opinion of the Supreme Court of Ohio in the instant case would be in the best financial interests of both this county and all forty-two (42) counties that have enacted a permissive sales and use tax.

[3]Ohio Rev. Code § 5741.021 (C).

[4] Ohio Rev Code §§ 5739.023 and 5741.022

CONCLUSION

For the reasons stated in the foregoing Petition, a Writ of Certiorari should issue to review the opinion and judgment of the Supreme Court of Ohio in this case.

Respectfully submitted,

WILLIAM J. BROWN
Attorney General

JOHN C. DUFFY, JR.
Assistant Attorney General
State Office Tower
30 East Broad Street
Columbus, Ohio 43215
(614) 466-3142

ATTORNEYS FOR THE PETITIONER

APPENDIX

American Modulars Corporation

Appellant

v.

Lindley, Tax Commr.

Appellee.

[Cite as American Modulars Corp. v. Lindley (1978), 54 Ohio St. 2d 273.]

Taxation–Permissive county use tax–R. C. 5741.021–Constitutionality.

Insofar as the application of R. C. 5741.021 imposes a higher tax rate on property purchased out of state and used in a taxing county than on similarly used property purchased in the state, that statute discriminates against interstate commerce and violates the Commerce Clause of the United States Constitution.

(No. 77-657—Decided May 24, 1978.)

Appeal from the Board of Tax Appeals.

Between 1970 and 1973, appellant, American Modulars Corporation (now merged with United States Steel Corp.), purchased tangible personal property from out-of-state and Ohio vendors for use in two counties which levied, pursuant to R. C. 5739.021 and 5741.021, one-half percent sales and use taxes. The Ohio purchases were made in counties which did not levy those taxes. On July 17, 1974, the Tax Commissioner of Ohio assessed a one-half percent use tax on appellant's use of the property purchased out of state. Appellant was not assessed the one-half percent sales and use taxes on property purchased in the state. Appellant appealed the Tax Commissioner's assessment to the Board of Tax Appeals on Ohio and federal constitutional grounds. The board determined that it was without jurisdiction to address the constitutional argument and affirmed the order of the commissioner.

The cause is now before this court on an appeal as of right.

Messrs. Glander, Brant, Ledman & Newman, Mr. C. Emory Glander and *Mr. Charles F. Glander,* for appellant.

Mr. William J. Brown, attorney general, and *Mr. John C. Duffy, Jr.,* for appellee.

William B. Brown, J. Pursuant to R. C. 5739.02 and 5741.02, the state of Ohio levies either a four percent use tax or a four percent sales tax on all tangible personal property sold at retail or stored, used or consumed within its borders. R. C. 5739.02 levies a sales tax on any property purchased in the state. R. C. 5741.02 levies a use tax on any property purchased out of state but stored, used or otherwise consumed in the state.[1] Moreover, it equalizes the tax burden imposed on in- and out-of-state purchases[2] by excepting from state use tax any property purchased in the state. R. C. 5741.02(C)(1).

[1] R.C. 5739.02 provides, in pertinent part:

"*** [A] n excise tax is hereby levied on each retail sale made in this state."

R.C. 5741.02 provides, in pertinent part:

"(A)*** [A] n excise tax is hereby levied on the storage, use, or other consumption in this state of tangible personal property***.

"***

"(C) The tax does not apply to the storage, use or consumption in this state of the following described tangible personal property, not to the storage, use, or consumption in this state of tangible personal property purchased under the following described circumstances:

"(1) When the sale of property in this state is subject to the excise tax imposed by sections 5739.01 to 5739.31 of the Revised Code, provided said tax has been paid***."

[2] The Ohio use tax "is complementary or supplemental to the 'sales tax' and is not designed to duplicate it." *Celina Mutual Ins. Co. v. Bowers* (1965), 5 Ohio St. 2d 12, 15.

Individual counties are also authorized but not required to levy additional one-half percent sales and use taxes on property purchased or used within their boundaries. R. C. 5739.021; 5741.021. Those county sales and use taxes are only imposed "in addition" to state sales and use taxes.[3] As a result, the same exceptions which apply to the state sales and use taxes apply to the county sales and use taxes as well.

The main issue raised in the instant cause is whether R. C. 5741.021, as a permissive local use tax incorporating the exceptions of a mandatory state use tax, violates the Commerce Clause of the United States Constitution.[4]

The purpose of the Commerce Clause of the United States Constitution is to create "an area of trade free from interference by the States. ***" *Freeman* v. *Hewit* (1946), 329 U.S. 249, 252. The United States Supreme Court has preserved that area of trade by declaring unconstitutional those state actions "which may fairly be deemed to have the effect of impeding the free flow of trade

[3] R.C. 5739.021 provides, in pertinent part:

"*** [A]ny county may levy a tax at the rate of one-half of one per cent in addition to the tax imposed by section 5739.02 of the Revised Code upon every retail sale, except sales of motor vehicles, made in the county.***

"(A) The tax on every retail sale subject to a tax levied pursuant to this section shall be in addition to the tax levied by section 5739.02 of the Revised Code.

"***

"(C) any tax levied pursuant to this section is subject to the exemptions provided in section 5739.02 of the Revised Code and in addition shall not be applicable to sales not within the taxing power of a country under the constitution of the United States or the constitution of this state."

R.C. 5741.021 also provides that the county use tax is to be imposed in addition to the state use tax. (R.C. 5741.021 [A].)

[4] "Appellee Tax Commissioner argues that the county permissive use tax proved for in R.C. 5741.021 does not unconstitutionally burden interstate commerce because the tax provides for equal treatment of in-state and out-of-state taxpayers. This argument is without merit because all that is at issue in the instant cause is the non-discriminatory tax treatment of out-of-state purchases by Ohio taxpayers on which no out-of-state tax or less than a four percent state tax has been paid.

between the States" (*Freeman, supra,* at page 252), whether the state action also subjects local commerce to an encumbrance (*Freeman, supra*) or the state action discriminates against interstate business by providing a direct commercial advantage to local business. *Halliburton Oil Well Cementing Co.* v. *Reily* (1963), 373 U.S. 64; *Northwestern States Portland Cement Co.* v. *Minnesota* (1959), 358 U.S. 450; *Welton* v. *Missouri* (1876), 91 U.S. 275. Moreover, such discrimination will be held unconstitutional even if it occurs merely in a statute's "practical operation." *Best & Co.* v. *Maxwell* (1940), 311 U.S. 454, 456.

The state action at issue in the instant cause is a permissive county use tax levied on goods used within a taxing county. The question before this court is whether that tax burdens interstate commerce by discriminating against the acquisition of goods when those goods are acquired out of state. *Halliburton Oil Well Cementing Co., supra,* at page 70; *Henneford* v. *Silas Mason Co.* (1937), 300 U.S. 577, 583-584.

R. C. 5741.021 provides, in pertinent part:

"*** [A]ny county which levies a tax pursuant to section 5739.021 of the Revised Code [the county sales tax provision] shall levy a tax at the same rate levied pursuant to section 5739.021 of the Revised Code *** and, in addition to that imposed by section 5741.02 of the Revised Code, on the storage, use, or other consumption in the county of tangible personal property which is subject to the tax levied by this state as provided in section 5741.02 of the Revised Code.***

"(A) The tax on the storage, use, or other consumption of tangible personal property levied pursuant to this section shall be in addition to the tax levied by section 5741.02 of the Revised Code.

"***

"(C) The tax levied pursuant to this section shall not be applicable *** to property on which a tax levied by a county pursuant to section 5739.021 or 5741.021 of the Revised Code has been paid or would have been paid had the county in which the original storage, use, or consumption of the property was made in this state levied a tax pursuant to such sections on the property."

R. C. 5741.021 appears, on its face, to provide uniform sales and use taxation at the county level. (Any county which imposes a sales tax on purchases made within the county must also impose a use tax on goods used within that county.) However, R. C. 5741.021 is also imposed "in addition" to the state use tax. Thus it is possible that R. C. 5741.021 discriminates in an "ingenious" rather than a "forthright" manner (*Best & Co., supra,* at page 455), and it is necessary to examine the effect of R. C. 5741.021 in relation to R. C. 5741.02 to determine if the county use and sales taxes tax property purchased in and out of state at the same rate.

The effect of the General Assembly's grafting state sales and use tax exceptions onto permissive local sales and use taxes in R. C. 5741.021 and 5739.021 is the following. Individual counties are not required to impose a one-half percent sales and use tax. Therefore, not all property purchased in state is subjected to a one-half percent county sales tax. (Since the sales tax applies only to purchases, this result is the same whether the property is subsequently used in a taxing county or not.) Moreover, since the same exceptions apply to the local use tax as to its state counterpart and the state use tax excepts property purchased in state, the one-half percent county use tax does not apply to property used in a taxing county unless that property was purchased out of state. The ultimate result is that *all* property used in a taxing county and purchased out of state is certain to have state and local use taxes levied on it at a four and one-half percent rate but not all property used in a taxing county and purchased elsewhere in state will be subject to a total four and one-half percent sales tax rate.[5]

5 The following chart also illustrates the effect of the state and county sales and use taxes:

Goods sold out of state USED IN COUNTY A; county A levies the permissive tax	Goods sold in Ohio in county A USED IN COUNTY A; county A levies the permissive tax
4% state use tax ½% county use tax	4% state sales tax ½% county sales tax
4½% total tax	4½% total tax
Goods sold out of state USED IN COUNTY B; county A (but not county B) has permissive tax	Goods sold in Ohio in county B USED IN COUNTY A; county A but not county B levies the permissive tax
4% state use tax 0% county use tax	4% state sales tax 0% county use tax 0% *county sales tax*
4% total tax	

Because goods used in taxing counties and purchased in non-taxing Ohio counties are not subject to a four and one-half percent tax even though identically used goods purchased out of state are so taxed, R. C. 5741.021 provides a direct commercial advantage to local purchases which impedes the free flow of trade between the states. *Freeman, supra.* Indeed, R. C. 5741.021 discriminates against out-of-state acquisitions as invidiously as it would if it subjected those purchases to unfavorable tax bases (*Halliburton, supra; Robert Emett & Son Oil & Supply Co.* v. *Sullivan* [1969], 158 Conn. 234, 259 A. 2d 636; *Matthews* v. *State* [Colo. 1977], 562 P. 2d 415) or if there were no county sales tax at all. (See *Henneford, supra,* and *Gray* v. *Oklahoma Tax Comm.* [Okla. 1963], 379 P. 2d 843.) Finally, the fact that R. C. 5741.021 discriminates against interstate commerce only in its practical effect does not bar a finding that it is unconstitutional. *Best & Co, supra.* We, therefore, hold that R. C. 5741.021 is unconstitutional insofar as its application imposes a higher tax rate on property purchased out of state and used in a taxing county than on similarly used property purchased in the state.

Accordingly, the decision of the Board of Tax Appeals affirming the order of the Tax Commissioner is reversed.

Decision reversed.

O'Neill, C. J., Herbert, Celebrezze, P. Brown, Sweeney and Locher, JJ., concur.

BEFORE THE BOARD OF TAX APPEALS

OF THE STATE OF OHIO

MAY 12, 1977

CASE NO. E-182

ENTRY

(SALES/USE)

American Modulars Corp.

433 Windsor Park Drive

Amberly Centre

Dayton, Ohio 45459

Appellant

v.

Edgar L. Lindley

Tax Commissioner of Ohio

Columbus, Ohio 43215

Appellee

APPEARANCES:
For the Appellant—Glander, Brant, Ledman & Newman
By: C. Emory Glander
250 East Broad Street
Columbus, Ohio 43215

For the Appellee—William J. Brown
Attorney General of Ohio
By: John C. Duffy, Jr., Assistant
State Office Tower—15th Floor
30 East Broad Street
Columbus, Ohio 43215

This cause and matter came on to be considered by the Board of Tax Appeals upon a notice of appeal filed herein under date of April 14, 1976, by the appellant above named from a final order of the Tax Commissioner dated March 17, 1976, wherein that official made some modifications in a prior sales and use tax assessment and found that the balance of the tax had been properly assessed. The body of said final order of the Tax Commissioner reads as follows:

"Consumer's Use Tax Account No. 97-113485

"The Tax Commissioner came to consider the above matter at a hearing held March 10, 1975, at Columbus, Ohio. Mr. Herman C. McCloud, Tax Attorney, U.S. Steel Corp., 600 Grant St., Pittsburgh, Pa.; Mr. Wayne E. Swift, Vice-President, American Modulars Corp., 2424 Far Hills Ave., Dayton, Ohio; and Mr. William H. Lutz, Jr., Attorney at Law, 1800 Union Commerce Bldg., Cleveland, Ohio, appeared on behalf of the assessee.

"Now, being fully advised thereon, the Commissioner finds that:

"Assessee has made four objections to the assessment, setting forth these objections in his petition for reassessment.

"1.) Air Conditioners. The assessee contends that air conditioners purchased for their Dayton motel were purchased for resale to motel guests and thus exempt. The air conditioning units are installed directly into a hole in the wall of a motel room. The assessee contends that the air conditioners remain personalty and are thus resellable.

"However, the Tax Commissioner finds this situation analogous to light fixtures. In both the case of light fixtures and the case of air conditioners, the items are affixed to the property, dedicated to the use of the property and would remain with the property if the property were sold. Thus, the Tax Commissioner finds that the assessee is the consumer of the air conditioners in that they incorporate the air conditioners into the realty. Objection denied.

"2.) Mathematical errors. The items listed at sheet 10, lines 8 and 11 are duplicated at sheet 12, lines 6 and 7. Sales tax of $2.73 should be deleted from the audit. The totals on sheets 51 and 90 are incorrect. Use tax of $13.32 should be deleted from the assessment.

"3.) Permissive Tax. The assessee contends that the county permissive tax is applied unequally in that it imposes an unreasonable burden on a consumer who makes out of state purchases. The Tax Commissioner is without authority to rule on the constitutionality of the statute. Further, the Tax Commissioner finds that the tax has been properly assessed in this case. Therefore, the assessee's objection must be denied.

"4.) Penalty. The request for remission of the penalty is conditionally allowed, in part, as noted below.

"Payment of $3,072.08 was received subsequent to the issuance of the assessment and will be a credit to the following finding.

"Therefore, it is the order of the Commissioner that if payment of

	Assessment	Penalty	Total
(Sales)	$ 2,958.36	$147.92	$ 3,106.28
(Use)	10,459.21	522.96	10,982.17
	Total Sales and Use Tax—		$14,088.45

is made within thirty (30) days after receipt by the taxpayer of this journal entry showing final determination, the assessment shall stand as adjusted in the above amount. In the event this matter is appealed to the Board of Tax Appeals; to an appropriate Court of Appeals; or to the Supreme Court, said thirty (30) day period shall begin to run from the date the entry of the Board of Tax Appeals is filed or the decision of an appropriate Appeals Court of the Supreme Court is rendered.

"If the total amount is not paid as above provided, the assessment shall stand adjusted in the following amount:

	Assessment	Penalty	Total
(Sales)	$ 2,958.36	$ 443.75	$ 3,402.11
(Use)	10,459.21	1,568.88	12,028.09
	Total Sales and Use Tax—		$15,430.20

From this final order the appellant filed its notice of appeal which provides as follows:

"Appellant, American Modulars Corp., hereby gives notice to the Board of Tax Appeals, Department of Taxation, State of Ohio, and to the Tax Commissioner, Department of Taxation, State of

Ohio, of its appeal to the Board of Tax Appeals from the final assessment, determination, finding and order of the Tax Commissioner made and entered under date of March 17, 1976, in the matter of Sales and Use Tax Assessment, Serial No. 7500507.

"Notice of said final assessment, determination, finding and order was received by Appellant on March 26, 1976. A true copy of said notice sent by the Tax Commissioner to Appellant is attached hereto, marked 'Exhibit A', and is incorporated herein by reference as though fully and completely rewritten herein.

"Appellant alleges that said final assessment, determination, finding and order is erroneous in the following respects:

"(1) The Tax Commissioner erred in failing to find that the assessment of the ½% Permissive County Use Taxes imposed by Montgomery and Hamilton Counties, Ohio on purchases of tangible personal property by Appellant from an out-of-state vendor, when the taxes would not have been imposed had the purchases been from a vendor in an Ohio county that had not imposed permissive sales and use taxes*, was unreasonable and unlawful on one or more of the following grounds:

"(a) The assessment of Permissive County Use Taxes on out-of-state purchases, but not all in-state purchases, imposes an unlawful and discriminatory burden on interstate commerce in violation of Article I, Section 8, Clause 3 of the United States Constitution.

"(b) The assessment of Permissive County Use Taxes on out-of-state purchases, but not all in-state purchases, discriminates against Appellant and denies it equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution and Article I, Section 2 of the Ohio Constitution.

"(c) The assessment of Permissive County Use Taxes on out-of-state purchases, but not all in-state purchases, deprives Appellant of its property without due process of law in violation of the Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution.

*Appellant purchased property for use in Montgomery and Hamilton Counties from vendors located in Ohio counties that had not enacted permissive county sales or use taxes. The Tax Commissioner has assessed Ohio state sales tax on such purchases (Assessment pages 23-28, 31-35 and 37-41), but has not assessed Montgomery or Hamilton County Permissive Use Taxes.

"(2) As a result of the erroneous determinations made by the Tax Commissioner as stated in paragraph (1) above, the Tax Commissioner further erred in determining that the purchases by Appellant listed in Exhibit B attached hereto and incorporated herein by reference were subject to Permissive County Use Taxes.

"(3) Accordingly, the Tax Commissioner erred in assessing Permissive County Use Taxes against Appellant in the aggregate amount of $9,529.73.

"(4) The Tax Commissioner abused his discretion and erred in refusing to remit in its entirety the penalty assessed against Appellant.

"(5) Said final assessment, determination, finding and order is contrary to law in the foregoing respects.

"WHEREFORE, Appellant prays that the Tax Commissioner certify to the Board of Tax Appeals a transcript of the record of the proceedings before him together with all evidence, documentary or otherwise, considered by him in connection therewith; that the Board of Tax Appeals find, determine, and hold that the Tax Commissioner erred in the respects stated above and in the assessment of Permissive County Use Taxes in the aggregate amount of $9,529.73 or in any other amount, and in the assessment of a penalty in the amount of $2,012.63 (conditionally reduced to $670.88); and that the Board of Tax Appeals enter an order cancelling and extinguishing said assessment of Permissive County Use Taxes, remitting the penalty in full and for such other and further relief as may be just in the premises."

Exhibit "B" provides:

"EXHIBIT B"
Items Erroneously Taxed as Specified
in Paragraph (2) of the Notice of Appeal

"I. *Montgomery County Permissive Use Tax*

*Page**	*Lines**	*Amount*	*Tax*
52	All	$ 65,432.78	$ 327.16
53	All	74,729.95	373.65
54	All	59,305.45	296.53
55	All	46,984.30	234.92
56	All	69,382.38	346.91
57	All	56,335.50	281.68
58	All	61,266.90	306.33
59	All	101,164.41	505.82
60	All	63,933.05	319.67
61	All	58,150.52	290.75
62	All	58,977.00	294.89
63	All	48,197.21	240.99
64	All	54,073.77	270.37
65	All	48,514.05	242.57
66	All	56,948.52	284.74
67	All	72,181.23	360.91
68	All	71,104.39	355.52
69	All	59,787.08	298.94
70	All	26,066.67	130.33
71	All	54,514.66	272.57
72	All	73,752.98	368.77
73	All	50,405.17	252.03
74	All	65,265.00	326.33
	Subtotal	$1,396,472.97	$6,982.38

"II. *Hamilton County Permissive Use Tax*

77	All	$ 6,371.00	$ 31.86
78	All	33,404.74	167.02
79	All	43,937.92	219.69
80	All	46,212.16	231.06
81	All	52,121.86	260.61
82	All	44,768.43	223.84
83	All	59,798.60	298.99
84	All	61,822.32	309.11
85	All	55,830.44	279.15
86	All	38,492.31	192.46
87	All	58,248.47	291.24
88	All	8,464.27	42.32
	Subtotal	$ 509,472.52	$2,547.35
	TOTAL	$1,905,945.49	$9,529.73

*Reference is to the Tax Commissioner's Audit Report."

Following the filing of the notice of appeal there was a change of Counsel for the appellant and thereafter on July 7, 1976, a five-page stipulations of fact was filed with the Board of Tax Appeals by Counsel for the parties with waiver of oral hearing expressly set out in said stipulations which stipulations provide in full as follows:

"STIPULATIONS"

"The undersigned parties hereby agree that for purposes of this proceeding and all appeals therefrom, the following facts are true.

"1. American Modulars Corp. ('Modulars') is a corporation organized and existing under the laws of the State of Ohio, and having its principal place of business in Dayton, Ohio.

"2. Modulars is engaged in the on-site construction and erection of modular homes in Ohio and other states pursuant to real estate construction contracts, and also construction of the same on its own land for future sale.

"3. During the sales and use tax audit period of April 1, 1970 through March 31, 1973, Modulars was engaged in the construction and erection of the aforesaid modular homes in, *inter alia,* Montgomery and Hamilton Counties, Ohio.

"4. Materials used in the performance of real estate construction contracts in Montgomery and Hamilton Counties, Ohio were purchased during the audit period by Modulars: (a) from vendors in states other than Ohio and, in particular, from one vendor located in the State of Indiana; and, (b) from vendors in Hancock, Butler and Clark Counties, Ohio.

"5. Modulars was invoiced and paid to the Indiana vendor the 4% Ohio state use tax on materials purchased from said vendor for delivery to the job-site for use in the performance of real estate construction contracts in Montgomery and Hamilton Counties, Ohio. Modulars was not invoiced and has not paid any county permissive sales or use taxes with respect to such purchases.

"6. Modulars was not invoiced and did not pay any Ohio state or county permissive sales or use taxes on materials purchased from certain vendors in Clark County (prior to November 1, 1972), Hancock County and Butler County, Ohio, for delivery to the job-site for use in the performance of real estate construction contracts in Montgomery and Hamilton Counties, Ohio, as detailed on Assessment pages 23-28, 31-35, and 37-41.

"7. Hamilton County, Ohio duly enacted permissive county sales and use taxes effective June 1, 1970 and said taxes were in effect thereafter for the balance of the audit period.

"8. Montgomery County, Ohio duly enacted permissive county sales and use taxes effective January 1, 1971 and said taxes were in effect thereafter for the balance of the audit period.

"9. Clark County, Ohio duly enacted permissive county sales and use taxes effective November 1, 1972 and said taxes were in effect thereafter for the balance of the audit period.

"10. Hancock and Butler Counties, Ohio have not enacted permissive county sales and use taxes and no such taxes were in effect during any portion of the audit period.

"11. Upon audit, the Tax Commissioner of Ohio, by Assessment serial number 7500507, dated July 17, 1974, assessed the following taxes against Modulars:

"a. The ½% Hamilton County permissive use tax in the amount of $2,547.35 on Modulars' purchases during the audit period (on or after June 1, 1970) of materials from the Indiana vendor for use in the performance of real estate construction contracts in said county.

"b. The ½% Montgomery County permissive use tax in the amount of $6,982.38 on Modulars' purchases during the audit period (on or after January 1, 1971) of materials from the Indiana vendor for use in the performance of real estate construction contracts in said county.

"c. The 4% Ohio state sales tax which certain vendors failed to bill on Modulars' purchases during the audit period of materials from vendors in Hancock, Butler and Clark Counties, Ohio for use in the performance of real estate construction contracts in Hamilton and Montgomery Counties, Ohio. (In the case of purchases in Clark County, Ohio, the ½% Clark County permissive sales tax was also assessed on Modular's purchases of materials on and after November 1, 1972, the effective date of said tax.)

"12. The Tax Commissioner has not assessed, and Modulars has not paid, the ½% Montgomery County permissive sales or use taxes or the ½% Hamilton County permissive sales or use taxes on its purchases of materials during the audit period from vendors in Clark County (prior to November 1, 1972), Hancock County and Butler County, Ohio, for delivery to the job-site for use in the performance of real estate construction contracts in Montgomery and Hamilton Counties, Ohio.

"13. From time to time the Ohio Department of Taxation has issued 'Notices' to direct payment permit holders regarding the application of county permissive sales and use taxes. One such Notice dated January 1, 1969 stated in pertinent part as follows:

'Tangible personal property is subjected to a 4% tax rate when purchased

'(1) in an Ohio county not having a permissive tax or

'(2) from a seller outside Ohio if the county where used does not have a permissive sales or use tax.

'The 4½% tax rate is applicable to tangible personal property purchased.

'(1) from vendors located in an Ohio county which has enacted a permissive county sales tax or

'(2) from sellers located outside Ohio for use in an Ohio county having a permissive sales and use tax.'

"Each party hereby waives its right to an oral hearing before the Board of Tax Appeals for the purpose of presenting additional facts or evidence pertinent to this case. There are, to the knowledge of the parties, no facts relevant to the questions presented by this appeal which are not contained in the foregoing Stipulations or in the Tax Commissioner's Statutory Transcript. Briefs of the parties may be filed within the times established by the Board of Tax Appeals.

GLANDER, BRANT, LEDMAN & NEWMAN

By James H. Ledman /s/
Attorneys for Appellant
American Modulars Corp.

WILLIAM J. BROWN, Attorney General

By John C. Duffy, Jr.
Assistant Attorney General
Attorneys for Appellee, Tax
Commissioner of Ohio"

The matter was submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript furnished by the Tax Commissioner, the stipulations of fact and the briefs filed by counsel.

The audit period involved in this assessment is April 1, 1970, to March 31, 1973.

The facts are fully set forth in the stipulation of facts supra.

It is appellant's contention that the primary issue in this case is whether the assessment of Montgomery and Hamilton County use taxes (Permissive Tax) on the use in such counties of personal property purchased outside Ohio, when the use in such counties of personal property purchased in Ohio in a county which has not enacted Permissive Sales and Use Taxes is not subject to a similar tax burden, is a discrimination against interstate commerce in violation of the Commerce Clause of the U.S. Constitution.

The Board of Tax Appeals agrees that this is the primary issue in the subject appeal.

Appellant presents three basic claims in support of its appeal to support its request that the Board of Tax Appeals reverse the Tax Commissioner in this assessment.

First that Ohio's State Sales and Use Taxes are Complimentary and as such put no more burden on inter-state sales than on intra sales or use.

Second that Ohio's Permissive County Sales and Use Taxes are not Complimentary in that Permissive Use Taxes are assessed on out-of-state purchases for use in an Ohio County which has enacted Permissive Sales and Use Taxes while Permissive Use Taxes are not assessed on out of County, in State, purchases for use in a County which has enacted Permissive Sales and Use Taxes and the County where the purchase is made has *not* enacted Permissive Sales and Use Taxes. Thus a purchase made in Indiana for use in Hamilton County, Ohio, which has a Permissive Sales and Use Tax is subjected to the ½% Use Tax, while a purchase made in Franklin County, Ohio, (which does not have Permissive Sales and Use Taxes) for use in Hamilton County, Ohio, is not subjected to ½% Permissive Tax in Hamilton County, Ohio.

Thirdly, the contention of appellant is that, as set forth in its primary contention, the Montgomery and Hamilton Use Taxes and the assessments thereunder are in violation of the Commerce Clause of the U.S. Constitution.

An able brief is presented in support of the contention and in response thereto the appellee purely and simply contends that the Board of Tax Appeals does not possess the authority to declare a statute unconstitutional nor can it decide whether a statute, as applied to a specific set of facts, violates the U.S. or Ohio Constitutions. The Board of Tax Appeals agrees with appellee's contention.

The only errors specified in appellant's notice of appeal involved questions concerning the constitutionality of the Tax Commissioner's determination of the basic tax assessment and as such the subject appeal is limited to constitutional questions.

The Board of Tax Appeals has long recognized its lack of jurisdiction over constitutional issues, whether State or Federal and the Supreme Court of Ohio has spoken on this question many times. See the first syllabus of *S. S. Kresge vs. Bowers* (1960), 170 Ohio St. 405 which provides:

"1. The Board of Tax Appeals is an administrative agency and is without jurisdiction to determine the constitutional validity of a statute."

Giving consideration to the facts, the statutes and case law and recognizing the limitation on the power of the Board of Tax Appeals where solely constitutional questions are involved, it is the decision of the Board of Tax Appeals that the final order of the Tax Commissioner must be, and hereby is, affirmed.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the State of Ohio, this day taken, with respect to the above matter.

Robert E. Boyd, Jr.
Chairman

Ohio Rev. Code §5739.02:

For the purpose of providing revenue with which to meet the needs of the state for poor relief in the existing economic crises, for the use of the general revenue fund of the state, for the purpose of securing a thorough and efficient system of common schools throughout the state, and for the purpose of affording revenues, in addition to those from general property taxes, permitted under constitutional limitations, and from other sources, for the support of local governmental functions, and for the purpose of reimbursing the state for the expense of administering sections 5739.01 to 5739.31 of the Revised Code, an excise tax is hereby levied on each retail sale made in this state.

(A) The tax is as follows:

(1) No tax is imposed if the price is less than sixteen cents.

(2) One cent, if the price is more than fifteen but not more than thirty-one cents;

(3) Two cents, if the price is more than thirty-one but not more than fifty-one cents;

(4) Three cents, if the price is more than fifty-one cents but not more than seventy-one cents;

(5) Four cents, if the price is more than seventy-one cents but not more than one dollar;

(6) If the price is in excess of one dollar, four cents on each full dollar and in addition, one cent if the price exceeds an even number of dollars by more than eight but not more than thirty-one cents; two cents if such excess is more than thirty-one but not more than fifty-one cents; three cents if such excess is more than fifty-one cents but not more than seventy-one cents; and four cents if such excess is over seventy-one cents.

The tax applies and is collectible when the sale is made, regardless of the time when the price is paid or delivered.

In the case of a sale, the price of which consists in whole or in part of rentals for the use of the thing transferred, the tax shall, as regards such rentals, be measured by the installments thereof.

(B) The tax does not apply to the following:

(1) Sales to the state, or any of its political subdivisions;

(2) Sales of food for human consumption off the premises where sold;

(3) Sales of food sold to students only in a cafeteria, dormitory, fraternity, or sorority maintained in a private, public, or parochial school, college, or university;

(4) Sales of newspapers, and of magazine subscriptions shipped by second class mail, and sales or transfers of magazines distributed as controlled circulation publications;

(5) The furnishing, preparing, or serving of meals without charge by an employer to an employee provided the employer records such meals as part compensation for services performed or work done;

(6) Sales of motor vehicle fuel upon receipt, use, distribution, or sale of which in this state a tax is imposed by the law of this state, but this exemption shall not apply to the sale of motor vehicle fuel on which a refund of said tax is allowable under section 5735.14 of the Revised Code; and the tax commissioner may deduct the amount of tax levied by this section applicable to the price of motor vehicle fuel when granting a refund of motor vehicle fuel tax pursuant to section 5735.14 of the Revised Code and shall cause the amount deducted to be paid into the general revenue fund of this state;

(7) Sales of artificial gas by a gas company as defined in section 5727.01 of the Revised Code, of natural gas by a natural gas company, as defined in said section, of electricity by an electric light company, as defined in said section, of water by a water works company, as defined in said section, of steam by a heating company, as defined in said section, if in each case the thing sold is delivered to consumers through wires, pipes, or conduits, and all sales of communications services by a telephone or telegraph company as defined in section 5727.01 of the Revised Code;

(8) Casual sales by a person, or auctioneer employed directly by him to conduct such sales, not engaged in the business of selling tangible personal property except as to such sales of motor vehicles and house trailers;

(9) Sales of tangible personal property, other than motor vehicles and house trailers, by churches or by organizations not for profit operated exclusively for charitable purposes as defined in division (B) (12) of this section, provided that the number of days on which such tangible personal property, other than items never subject to the tax, is sold does not exceed six in any calendar year or one in any calendar month. If the number of days on which such sales are made exceeds six in any calendar year or one in any calendar month, the church or organization shall be considered to be engaged in business and all subsequent sales by it shall be subject to the tax. In counting the number of days, all sales by groups within a church or within an organization shall be considered to be sales of such church or organization;

(10) Sales not within the taxing power of this state under the constitution of the United States;

(11) The transportation of persons or property;

(12) Sales of tangible personal property to churches and to organizations not for profit operated exclusively for charitable purposes in this state, no part of the net income of which inures to the benefit of any private shareholder or individual and no substantial part of the activities of which consists of carrying on propaganda or otherwise attempting to influence legislation.

Charitable purposes means the relief of poverty, the improvement of health through the alleviation of illness, disease, or injury, the operation of a home for the aged, as defined in section 5701.13 of the Revised Code, the promotion of education by an institution of learning which maintains a faculty of qualified instructors, teaches regular continuous courses of study, and confers a recognized diploma upon completion of a specific curriculum, or the promotion of education by an organization engaged in carrying on research in, or the dissemination of scientific and technological knowledge and information primarily for the public.

Nothing in this division shall be deemed to exempt sales to any organization for use in the operation or carrying on of a trade or business.

(13) Building and construction materials sold to construction contractors for incorporation into a structure or improvement to real property under a construction contract with this state or a political subdivision thereof or with the United States government or any of its agencies, building and construction materials sold to construction contractors for incorporation into a structure or improvement to real property which are accepted for ownership by this state or any of its political subdivisions or by the United States government or any of its agencies at the time of completion of such structures or improvements, building materials sold to a construction contractor for incorporation into a house of public worship or religious education or a building used exclusively for charitable purposes under a construction contract with an organization whose purpose is as described in division (B) (12) of this section, and building materials sold to a construction contractor for incorporation into a structure or improvement to real property outside this state whether incorporated in the form received or after fabrication;

(14) Sales of ships or vessels used or to be used principally in interstate or foreign commerce, and repairs, alterations, fuel, and lubricants for such ships or vessels;

(15) Sales to persons engaged in any of the activities mentioned in division (E) (2) of section 5739.01 of the Revised Code, of packages, including material and parts therefor, and of machinery, equipment, and material for use in packaging tangible personal property produced for sale, or sold at retail. Packages include bags, baskets, cartons, crates, boxes, cans, bottles, bindings, wrappings, and other similar devices and containers and "packaging" means placing therein.

(16) Sales to persons engaged in manufacturing, processing, assembling, or refining, of handling and transportation equipment, except motor vehicles licensed to operate on the public highways, used in intra or inter plant transfers or shipments of tangible personal property in the process of production for sale by manufacturing, processing, assembling, or refining, where the plant or plants within or between which such transfers or shipments occur are operated by the same person;

(17) Sales to persons engaged in farming, agriculture, horticulture, or floriculture, of tangible personal property for use or consumption directly in the production by farming, agriculture, horticulture, or floriculture of other tangible personal property for use or consumption directly in the production of tangible personal property for sale by farming, agriculture, horticulture, or floriculture; or material and parts for incorporation into any such tangible personal property for use or consumption in production; and of tangible personal property for use or consumption in the conditioning or holding of products produced by and for such use, consumption, or sale by persons engaged in farming, agriculture, horticulture, or floriculture except where such property is incorporated into real property;

(18) Sales of drugs dispensed by a registered pharmacist upon the order of a practitioner licensed to prescribe, dispense and administer drugs to a human being in the course of his professional practice, artificial limbs or portion thereof for humans, braces and other similar medical or surgical devices for supporting weakened or useless parts of the human body, wheel chairs, and ostomy appliances and the supplies and accessories for the function and maintenance thereof, insulin as recognized in the official United States Pharmacopoeia, urine testing materials when used by diabetics to test for glucose or acetone, and hypodermic syringes and needles when used by diabetics for insulin injections;

(19) Sales of emergency and fire protection vehicles and equipment to not for profit organizations for use solely in providing fire protection and emergency services for political subdivisions of the state;

(20) Sales of tangible personal property, manufactured in this state, if sold by the manufacturer in this state to a retailer for use in his retail business outside of this state and if possession is taken from the manufacturer by the purchaser within this state for the sole purpose of immediately removing the same from this state in a vehicle owned by the purchaser;

(21) Sales of cigarettes;

(22) Sales of motor vehicles to nonresidents of this state upon the presentation of an affidavit executed in this state by the nonresident purchaser affirming that the purchaser is a nonresident of this state, that possession of the motor vehicle is taken in this state for the sole purpose of immediately removing it from this state, that the motor vehicle will be permanently titled and registered in another state, and that the motor vehicle will not be used in this state;

(23) Sales to persons engaged in the preparation of eggs for sale of tangible personal property used or consumed directly in such preparation, including such tangible personal property used for cleaning, sanitizing, preserving, grading, sorting and classifying by size; packages, including material and parts therefor, and of machinery, equipment, and material for use in packaging eggs for sale; and handling and transportation equipment and parts therefor, except motor licensed to operate on public highways, used in intra-plant or inter-plant transfers or shipment of eggs in the process of preparation for sale, where the plant or plants within or between which such transfers or shipments occur are operated by the same person. "Packages" includes containers, cases, baskets, flats, fillers, filler flats, cartons, closure materials, labels, and labeling materials, and "packaging" means placing therein;

(24) Sales of water to a consumer for residential use, except the sale of bottled water, distilled water, mineral water, carbonated water, or ice.

For the purpose of the proper administration of sections 5739.01 to 5739.31 of the Revised Code, and to prevent the evasion of the tax, it is presumed that all sales made in this state are subject to the tax until the contrary is established.

As used in this section "food" includes cereals and cereal products, milk and milk products including ice cream, meat and meat products, fish and fish products, eggs and egg products, vegetables and vegetable products, fruits, fruit products, and pure fruit juices, condiments, sugar and sugar products, coffee and coffee substitutes, tea, and cocoa and cocoa products. IT does not include: spirituous or malt liquors; soft drinks, sodas

and beverages which are ordinarily dispensed at bars and soda fountains or in connection therewith other than coffee, tea, and cocoa; root beer and root beer extracts; malt and malt extracts; mineral oils, cod liver oils, halibut liver oil; medicines, including tonics, vitamin preparations, and other products sold primarily for their medicinal properties; and water, including mineral, bottled, and carbonated waters and ice.

(C) The levy of an excise tax on transactions by which lodging by a hotel is or is to be furnished to transient guests pursuant to the section and division (B) of section 5739.01 of the Revised Code does not prevent a municipal corporation or township from levying an excise tax not to exceed three per cent on transactions by which lodging by a hotel is or is to be furnished to transient guests in addition to the tax levied by this section.

Ohio Rev. Code §5739.021:

For the purpose of providing additional general revenues for the county and paying the expenses of administering such levy, any county may levy a tax at the rate of one-half of one per cent in addition to the tax imposed by section 5739.02 of the Revised Code upon every retail sale, except sales of motor vehicles, made in the county. The tax shall be levied pursuant to a resolution of the county commissioners and a certified copy thereof shall be delivered to the tax commissioner either personally or by certified mail not later than the sixtieth day prior to the date on which the tax is to become effective. Prior to the adoption of any such resolution, the board of county commissioners shall conduct two public hearings thereon, the second hearing to be not less than three nor more than ten days after the first. Notice of the date, time, and place of such hearings shall be given by publication in a newspaper of general circulation in the county once a week on the same day of the week for two consecutive weeks, the second publication being not less than ten nor more than thirty days prior to the first hearing. If a petition for a referendum is filed with the county auditor pursuant to sections 305.31 to 305.41, inclusive, of the Revised Code, the auditor shall, within five days, notify the board of county commissioners and the tax commissioner of the filing of said petition by certified mail. If the auditor declares the petition invalid, he shall, within five days, notify the board and the tax commissioner of his findings by certified mail. Where the

auditor has declared the petition to be invalid the effective date of the tax levied by this section shall be the first day of the month following the expiration of thirty days from the date the petition was declared invalid.

A resolution levying a sales tax pursuant to this section shall become effective on the first day of the month following the expiration of sixty days from the date of its adoption, subject, to a referendum as provided in sections 305.31 to 305.41, inclusive, of the Revised Code, unless such resolution is adopted as an emergency measure necessary for the immediate preservation of the public peace, health, or safety, in which case it shall to into effect on the first day of the month following the expiration of five days from the date of notice by the board of county commissioners to the tax commissioner of its adoption. Such emergency must receive an affirmative vote of all of the members of the board of commissioners, and shall state the reasons for such necessity. A resolution may direct the board of elections to submit the question of levying the tax to the electors of the county at the next primary or general election in the county occurring not less than ninety days after such resolution is certified to the board, and no such resolution shall go into effect unless approved by a majority of those voting upon it and not until the first day of the month following the expiration of five days from the date of notice to the tax commissioner by the board of elections of such affirmative vote.

(A) The tax on every retail sale subject to a tax levied pursuant to this section shall be in addition to the tax levied by section 5739.02 of the Revised Code.

(B) If the additional tax is levied by the county at the rate of one-half of one per cent the combined state and county tax shall be as follows:

If the price is at least	But not more than	The amount of the tax is
$ .01	$ .15	No tax
.16	.22	1¢
.23	.44	2¢
.45	.66	3¢
.67	.88	4¢
.89	1.11	5¢
1.12	1.33	6¢
1.34	1.55	7¢
1.56	1.77	8¢
1.78	2.00	9¢
2.01	2.22	10¢
2.23	2.44	11¢
2.45	2.66	12¢
2.67	2.88	13¢
2.89	3.11	14¢
3.12	3.33	15¢
3.34	3.55	16¢
3.56	3.77	17¢
3.78	4.00	18¢
4.01	4.22	19¢
4.23	4.44	20¢
4.45	4.66	21¢
4.67	4.88	22¢
4.89	5.11	23¢

If the price is in excess of an even dollar, four and one-half cents for each full dollar and in addition, one cent if the price exceeds an even dollar but not more than such even dollar and twenty-two cents; two cents if the price exceeds an even dollar and twenty-two cents but not more than such even dollar and forty-four cents; three cents if the price exceeds an even dollar and forty-four cents but not more than such even dollar and sixty-six cents; four cents if the price exceeds an even dollar and sixty-six cents but not more than such even dollar and eighty-eight cents; five cents if the price exceeds an even dollar and eight-eight cents but not more than the following odd dollar and eleven cents; six cents if the price exceeds such odd dollar and eleven cents, but not more than such odd dollar and thirty-three cents; seven cents if the price exceeds such odd dollar and thirty-three cents but not more than such odd dollar and fifty-five cents; eight cents if the price exceeds such odd dollar and fifty-five cents but not more than such odd dollar and seventy-seven cents; nine cents if the price exceeds such odd dollar and seventy-seven cents but not more than the following even dollar.

(C) Any tax levied pursuant to this section is subject to the exemptions provided in section 5739.02 of the Revised Code and in addition shall not be applicable to sales not within the taxing power of a county under the constitution of the United States or the constitution of this state.

PROOF OF SERVICE

I, John C. Duffy, Jr., Assistant Attorney General of Ohio, one of the attorneys for Edgar L. Lindley, Tax Commissioner of Ohio, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 22nd day of August 1978, I served three copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of Ohio on C. Emory Glander and Charles F. Glander, Glander, Bryant, Ledman & Newman, 250 East Broad Street, Columbus, Ohio 43215, Attorneys for American Modulars Corp., the Respondent herein, by mailing said copies to said attorneys in a properly assressed envelope with certified mail prepaid.

WILLIAM J. BROWN
Attorney General

JOHN C. DUFFY, JR.
Assistant Attorney General

ATTORNEYS FOR PETITIONER

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-291

AMERICAN MODULARS CORP.,
Respondent,

v.

EDGAR L. LINDLEY,
TAX COMMISSIONER OF OHIO,
Petitioner.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

C. EMORY GLANDER
CHARLES F. GLANDER
GLANDER, BRANT, LEDMAN & NEWMAN
250 East Broad Street
Columbus, Ohio 43215
614/221-2121

DOUGLAS S. ROBERTS of Counsel
with them on the Brief

Attorneys for Respondent

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

The Respondent, AMERICAN MODULARS CORP., respectfully prays that this Court deny Petitioner's petition for a writ of certiorari to review the judgment and opinion of the Supreme Court of Ohio entered in this proceeding on May 24, 1978.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Art. I, §8, cl. 3:

> The Congress shall have power . . .
>
> To regulate commerce with foreign nations and among the several states . . .

OHIO STATUTES INVOLVED

Ohio Rev. Code §5739.02

Ohio Rev. Code §5739.021

Ohio Rev. Code §5741.02

Ohio Rev. Code §5741.021

QUESTION PRESENTED FOR REVIEW

The question before the Court is whether the State of Ohio may, by a permissive county use tax, provide a direct economic advantage to local business by imposing upon the products of other states brought into Ohio for use a more onerous public burden than it imposes upon like products purchased within Ohio.

STATEMENT OF THE CASE

Between 1970 and 1973, Respondent, American Modulars Corporation, purchased tangible personal property from out of state (out of Ohio) and Ohio vendors for use in two Ohio counties, Montgomery and Hamilton, which levied, pursuant to R.C. §5739.021 and §5741.021, one-half percent sales and use taxes. Certain Ohio purchases were made from vendors located in counties which did not levy those taxes. On July 17, 1974, the Tax Commissioner of Ohio assessed a one-half percent use tax on Respondent's use of the property purchased out of state. Respondent was not assessed the one-half percent sales or use tax on its aforesaid Ohio purchases.

Pursuant to R.C. §5739.021 and §5741.021, Ohio has authorized Ohio counties to adopt, if they desire the additional revenue, permissive county sales and use taxes at a rate of one-half percent. In pertinent part, these sections provide as follows:

> R.C. §5739.021
>
> . . . any county may levy a tax at the rate of one-half of one percent in addition to the tax imposed by section 5739.02 of the Revised Code upon every retail sale . . . made in the county . . .
>
> R.C. §5741.021
>
> . . . any county which levies a tax pursuant to section 5739.021 of the Revised Code *shall levy* a tax . . . in addition to that imposed by section 5741.02 of the Revised Code, on the storage, use, or other consumption in the county of tangible personal property, *which is subject to the tax levied by this state as provided in section 5741.02 of the Revised Code* . . . (Emphasis added)
>
> [§5741.02 is the Ohio state use tax.]

In Ohio, counties possess only such powers and privileges as may be delegated to or conferred upon them by statute. *Lake County v. Ashtabula County,* 24 Ohio St. 393 (1873); *Portage County v. Gates,* 83 Ohio St. 19, 93 N.E. 255 (1910). Pursuant to the authority delegated in R.C. §5741.021, counties can therefore levy a use tax only on the storage, use, or other consumption of property which is subject to the state use tax. With the exception of a purchase of tangible personal property within Ohio where the state sales tax should have been, but was not, paid, the state use tax is levied only on property purchased outside Ohio, not on property purchased within Ohio. R.C. §5741.02 (C) (1). Hence, the permissive use tax is a tax which, like the state use tax, is levied wholly because the property is purchased outside Ohio.[1]

Because approximately forty-two of the eighty-eight counties in Ohio have enacted the local permissive sales and use taxes, and the others have not, preferential trade areas are created that provide local purchases with commercial advantages. For instance, when a taxpayer located in a taxing county purchases materials from an Ohio vendor located in a non-taxing county, no local sales or use tax is levied: No local sales tax because the property is not purchased in a taxing Ohio county; and no local use tax because the property is purchased in Ohio, so that the state use tax does not apply. However, when this same taxpayer purchases the identical materials from out of state, a

1. This statement is true subject to the exception mentioned above with respect to the state use tax, R.C. §5741.02(C) (1), and to automobiles which are segregated for special statutory treatment. R.C. §5741.021.

local use tax must be levied on the transaction because the Ohio state use tax is levied upon it.

Respondent appealed the final assessment of the permissive use tax to the Ohio Board of Tax Appeals on Ohio and Federal constitutional grounds. The Ohio Board of Tax Appeals affirmed the Tax Commissioner's assessment of the permissive use tax because it is without jurisdiction to declare a statute or its application unconstitutional. *S. S. Kresge Co. v. Bowers,* 170 Ohio St. 405, 166 N.E. 2d 139 (1960). Respondent then appealed the decision to the Supreme Court of Ohio as of right.[2]

The question before the Court was whether the Ohio permissive county use tax burdens interstate commerce by discriminating against the acquisition of goods from outside the state for use in Ohio, contrary to the United States Constitution.

The Court decided the issue as follows:

> "Insofar as the application of R.C. 5741.021 imposes a higher tax rate on property purchased out of state and used in a taxing county than on similarly used property purchased in the state, that statute discriminates against interstate commerce and violates the Commerce Clause of the United States Constitution."
>
> *American Modulars Corp. v. Lindley,* 54 Ohio St. 2d 273, 376 N.E. 2d 575 (1978)

From this decision, the Petitioner has filed his petition for writ of certiorari.

2. R. C. §5717.04

REASONS FOR DENYING THE WRIT

The instant case presents no Federal question of substance that has not heretofore been considered by this Court. No matter how a state chooses to exercise its taxing power, whether it be by a state sales and use tax or by a permissive county sales and use tax adopted pursuant to state statute, the established rule of law is the same: No state may, consistent with the commerce clause, exercise such taxing power so as to discriminate against interstate commerce by providing a direct advantage to local business. *Halliburton Oil Well Cementing Company v. James S. Reily,* 373 U.S. 64, 10 L. Ed. 2d 202, 83 S. Ct. 1201 (1963); *Northwestern States Portland Cement Co. v. State of Minnesota,* 358 U.S. 450, 3 L. Ed. 2d 421, 79 S. Ct. 357 (1959); *Harold H. Henneford, et al. v. Silas Mason Company, Inc.,* 300 U.S. 577, 81 L. Ed. 814, 57 S. Ct. 524 (1937); *Boston Stock Exchange, et al. v. State Tax Commission, et al.,* 429 U.S. 318, 50 L. Ed. 2d 514, 97 S. Ct. 599 (1977); *Sonneborn Brothers v. Cureton (Sonneborn Brothers v. Keeling),* 262 U.S. 506, 516, 67 L. Ed. 1095, 1100, 43 S. Ct. 643, 648 (1923); *M. M. Welton v. State of Missouri,* 91 U.S. 275, 23 L. Ed. 347 (1876). Such discrimination is unconstitutional even if it occurs merely in the *practical operation* of the statute. *Best & Company, Inc. v. A. J. Maxwell,* 311 U.S. 454, 85 L. Ed. 275, 61 S. Ct. 334 (1940).

Under Ohio law, counties may levy a one-half percent use tax on the storage, use, or other consumption in the county of tangible personal property. Because only some of the Ohio counties have enacted the tax, the statutory taxing scheme, as construed by the Supreme Court of Ohio, produces the following results:

> "Because goods used in taxing counties and purchased in non-taxing Ohio counties are not subject to a four and one-half percent tax even though identically used goods purchased out of state are so taxed, R.C. 5741.021 provides a direct commercial advantage to local purchases which impedes the free flow of trade between the states. *Freeman, supra.* [*Freeman v. Hewit,* 329 U.S. 249, 91 L. Ed. 265, 67 S. Ct. 274 (1946)] Indeed, R.C. 5741.021 discriminates against out-of-state acquisitions as invidiously as it would if it subjected those purchases to unfavorable tax bases (*Halliburton, supra; Robert Emett & Son Oil & Supply Co. v. Sullivan* [1969], 158 Conn. 234, 259 A. 2d 636; *Matthews v. State* [Colo. 1977], 462 P. 2d 415) or if there were no county sales tax at all. (See *Henneford, supra,* and *Gray v. Oklahoma Tax. Comm.* [Okla. 1963], 379 P. 2d 843.) Finally, the fact that R.C. 5741.021 discriminates against interstate commerce only in its practical effect does not bar a finding that it is unconstitutional. *Best & Co., supra.*"[3]
>
> *American Modulars Corp. v. Lindley,* 54 Ohio St. 2d 273, 278, 376 N.E. 2d 575, 578 (1978).

Having thus described the *practical operation* of the Ohio permissive county use tax, the Ohio Supreme Court, correctly construing the above-cited decisions of this Court, properly held as follows:

> "We, therefore, hold that R.C. 5741.021 is unconstitutional insofar as its application imposes a higher tax rate on property purchased out of state and

3. The rate of Ohio's state sales and use taxes is 4%; thus, in counties which have levied the county permissive taxes the combined rate is 4½%. Both taxes are assessed and enforced by the State Tax Commissioner. R.C. §5741.06.

used in a taxing county than on similarly used property purchased in the state."

American Modulars Corp., supra, at 278, 376 N.E. 2d at 578.

Petitioner makes several allegations that confuse the issue before the Court. The question is not whether Ohio has achieved as much equality under the present system as is administratively feasible; neither is it whether a different taxing scheme would withstand an equal protection attack, nor whether another permissive use tax under a different statute provides the necessary revenue to operate a transit system. Rather, the question is whether the present system will survive constitutional scrutiny. Following the principles established by this Court, the Ohio Supreme Court unanimously held that it did not.

CONCLUSION

The Ohio Supreme Court found, as a matter of law, that R.C. §5741.021 discriminated against interstate commerce by providing a direct commercial advantage to goods purchased in Ohio. Construing the decisions of this Court which hold that no state may, consistent with the commerce clause, impose a tax that provides a commercial advantage to local business, the Supreme Court of Ohio held that R.C. §5741.021 is unconstitutional insofar as its application imposes a higher tax on property purchased out of state and used in a taxing county than on similarly used property purchased in the state. In so holding, the Supreme Court of Ohio considered no Federal question of substance not heretofore determined by this Court and it decided the case in accordance with the applicable decisions of this Court. Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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C. EMORY GLANDER

.....

CHARLES F. GLANDER
GLANDER, BRANT, LEDMAN & NEWMAN
250 East Broad Street
Columbus, Ohio 43215
614/221-2121

DOUGLAS S. ROBERTS of counsel
with them on the Brief

Attorneys for Respondent

PROOF OF SERVICE

I, C. Emory Glander, one of the attorneys for American Modulars Corp., Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the ..... day of ....., 1978, I served three copies of the foregoing Brief in Opposition to Petitioner's Petition for a Writ of Certiorari to the Supreme Court of Ohio on William J. Brown and John C. Duffy, Jr., State Office Tower, 30 East Broad Street, Columbus, Ohio 43215, attorneys for Petitioner Edgar L. Lindley, Petitioner herein, by mailing such copies to said attorneys in a properly addressed envelop with certified mail prepaid.

.....

C. EMORY GLANDER